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No. 2699.

United States
Circuit Court of Appeals
For the Ninth Circuit

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation,

Appellant,

vs.

CLARA MILLS, GEORGE F. STEELE, Insurance Commissioner of the State of Idaho, et al.,

Appellees.

Brief of Appellees, Mills and Associates

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

W. E. SULLIVAN and
L. L. SULLIVAN,
Solicitors for Appellees.
Residence: Boise, Idaho.

SYMS YORK CO. PRINTERS & BINDERS BOISE 39834

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STATEMENT OF THE CASE.

The statement of the case made by appellant is in the main correct. We therefore adopt the same, except those portions which are argumentative and those portions which are mere conclusions of the appellant as to certain parts of the pleadings and orders of the lower court.

We, however, wish to add thereto a further statement of matters which are not set forth in the appellant's statement.

The appellees, appearing upon this appeal, filed two motions to dismiss the Bill of Complaint herein upon several grounds, both motions being upon the same grounds. (Rec. pp. 56-60.) These motions were both denied. The decision of the court on the motion to dismiss treats of two matters:

1. Jurisdiction.
2. Injunctive relief.

On the question of jurisdiction the court held that it had a right to proceed as to certain relief prayed for in the complaint. In other words, that there was such a community of interest between all defendants that the penal sum of the bond might properly be considered as the matter in dispute or that the claims could be divided into three groups and aggregated in determining the question of jurisdictional amount, and that the court would therefore proceed on the theory that it could compel the defendants to prorate, provided the total number of valid claims or judgments exceeded the penalty of the bond. (Rec. pp. 64-69.)

On the question of injunctive relief the court held that it should go no further than to afford protection to the plaintiff against the necessity of paying in excess of the penalty of the bond, and therefore ordered that an injunctive order issue against the plaintiffs in the Mills suit, appellees herein, restraining them from collecting more of the penalty of the

bond than would be their proportionate share thereof, assuming that all claims were correctly scheduled in the Bill of Complaint and were valid. (Rec. pp. 69-71.) The court then further ordered:

> "Counsel for the plaintiff may make the necessary computations, and submit the form of the order to opposing counsel." (Rec., 71.)

Counsel for the Surety Company, plaintiff below, thereupon computed what the proportionate share of Mills et al. would be and submitted the figures to their counsel who approved the same, and the proportionate share was thus agreed upon as $13,614.00. The court thereupon accepted said amount as the proper proportionate share of Mills et al. and entered the orders appealed from herein, restraining Mills et al. from collecting that portion of their judgment which would be in excess of their said proportionate share. (Rec., 72-75.) These orders were entered on October 9th, and October 15th, 1915. Thereupon, on October 14th, 1915, Mills et al. caused execution to be issued from the state court, wherein their judgment had been obtained, for their said proportionate share. On or about October 30th, 1915, and prior to a sale under said execution, said Surety Company, plaintiff below, filed its petition for appeal herein and therein requested the court to stay the enforcement of the Mills et al. judgment for the collection of the said proportionate share pending this appeal and to restrain Mills et al. from proceeding further with their sale on said execution. (Rec., 84-85.)

Said request to stay and enjoin, as aforesaid, was

supported by an affidavit of one of the counsel for appellant, which recites in full the facts as to the issue of said execution and the proceedings for a sale thereon and also recites that Mills et al. were proceeding to enforce their said proportionate share of said judgment,

> " * * * * without accounting for the dividends to the amount of several thousand dollars received by them since the entry of said judgment from the receiver of the Idaho State Bank at Hailey, Idaho, on the identical claims on which said judgment was recovered against the said American Surety Company of New York, plaintiff herein." (Rec., 90.)

The question of dividends thus raised was met by an affidavit of one of counsel for Mills et al. showing the dates and amounts of the dividends received and that said judgment of Mills et al. had been satisfied of record to an amount of said dividends. Said affidavit recites as follows:

> "That the Receiver of the Idaho State Bank paid the following dividends to all of the depositors of said bank, including Mills et al., Dithmer et al., and William Leonard, to-wit:

On May 25, 1913	10%
On December 19, 1913	5%
On September 24, 1914	3%
Total	18%

> "That on the 14th day of October, 1915, a partial satisfaction of said judgment was duly made and endorsed on the margin of the Judgment Docket for said District Court of Blaine County

> for the above dividends of 18%, amounting to $3,420.75; that said dividends are the only payments that have been made upon said judgment, and the only dividends that have been paid up to the date hereof by said Receiver." (Rec., 94.)

Thereupon a hearing was had by the court on said petition for appeal and requests for said stay and restraining order pending appeal, supported by said affidavits, and an order was then entered by said court allowing the appeal and restraining Mills et al. from proceeding further to collect said proportionate share pending the appeal herein, but said stay and restraining order pending the appeal being discretionary with said lower court, it further provided that it would only enter an order staying said execution pending the appeal, upon certain conditions, such as a larger rate of interest and a small attorney's fee for the hearings before it on the stay matter and not as attorneys' fee on appeal, to be paid in case the appellant was not successful on its appeal. (Rec., 87-89.)

It will be noted that in the order allowing the appeal and setting forth the conditions upon which a stay would be granted pending an appeal, that the lower court accepted as a fact that the amount of the dividends which had been received and credited on the judgment was $3,420.75. (Rec., 88.) So this practically disposes of the false alarm which appellant seems to be laboring under that Mills et al. are going to endeavor to collect the full amount of their judgment without giving credit for the dividends.

Said conditions were met by appellant and a bond given conditioned as provided by the order of the lower court, and thereupon the appeal herein perfected from the two interlocutory orders and the decision of September 2nd, 1915, wherein the full injunctive relief prayed for was denied.

The appellant in its statement of the case does not clearly show what was alleged in the Bill of Complaint as to the Surety Company moving to set aside the default and the default judgment entered in the Mills case in the state court. The complaint clearly alleges that a default and default judgment were entered in the state court in the Mills action and seeks to explain wherein the default was wrongfully entered while the defendant was attempting to remove the action to the federal court, and then shows that an application was made to the state court to set aside the default which was contested by counsel for the plaintiff and that the court refused to set aside the default. (Rec., 23-24.) An appeal was thereupon taken by the Surety Company to the Supreme Court of the State in the Mills et al. action wherein one of the errors assigned was that the lower court had erred in refusing to set aside said default. The Supreme Court in its decision sustained the lower court and held that the lower court had properly refused to set aside the default and default judgment. While the appeal to the Supreme Court and its decision is not mentioned in the Complaint, it is referred to in appellant's brief herein and the decision cited, State ex rel. Mills et al. v. American Surety Company, 26 Idaho 652.

The appeal herein purports to be from the decision of September 2nd, 1915, and the orders of Oct. 9th and Oct. 14th, 1915. Said decision was the Court's decision on appellees' motion to dismiss, and of course is not an appealable decision, but can only be reviewed by an appeal from the final judgment. But we presume the appeal was made to include this decision as it held that plaintiff below was not entitled to the full injunctive relief asked, and thereupon directed counsel for plaintiff to prepare the proper order, which is the order of October 9th. As we view it, the only proper appeal, and the only one this Court will consider, is from the orders of Oct. 9th and 14th.

AS TO ASSIGNMENT OF ERRORS.

Upon an examination of the assignment of errors as set forth in the brief of appellant, we find that they are not the same as the assignment of errors filed with the petition for appeal. (Rec., 78-82.) The assignment of errors in the brief has been enlarged upon and covers matters not set forth in the errors originally assigned. In this respect we call the Court's attention to errors 2, 3, 6 and 7 as set forth in the brief.

We call the Court's particular attention to error 7 as to the lower court imposing unreasonable burdens upon the appellant as a condition for supersedeas pending the appeal. This is an entirely new error. The appellant herein is appealing from the decision of September 2, 1915, and the orders of October 9 and 14, 1915. Said decision, or the orders appealed

from, do not treat of this matter in any way. The order which provides the conditions for the allowance of a supersedeas is an entirely separate order, entered at a later date, on October 30, 1915. There was no appeal taken from this order. So we hardly believe that this Court will permit appellant to assign a new error, for the first time in its brief on this appeal, which could be only reviewed by an appeal from another order.

POINTS AND AUTHORITIES.

I.

> "Equity will refuse to act by injunction when the grounds alleged have already been considered and held insufficient on a motion at law; in such case the whole matter is res judicata and equity will not re-open it."

I Black on Judgments, Sec. 362.
23 Cyc. 1017.
I Whitehouse Eq. Prac., § 152, Note 59c.
I High on Irrig., § 226.
U. S. v. Anderson, 169 Fed. 205.
Wilson v. Buchanan, 170 Pa. 14.
Matson v. Field, 10 Mo. 100.
Davis v. Bass, 4 Ind. 313.
Collins v. Butler, 14 Cal. 223.
Critchfield v. Porter, 3 Ohio 518.
Gray v. Barton, 28 N. W. 813.
Dalhoff v. Keenan, 24 N. W. 273.
Fulliam v. Drake, 75 N. W. 479.
Telford v. Brinkerhoff, 163 Ill. 439.
Hoffman v. Burris, 71 N. E. 584.
Hartness v. Brown, 59 Pac. 490.

II.

The federal decisions, since the adoption of the Judicial Code, in construing that part of Sec. 29 requiring the giving of written notice to the adverse party of the filing of the petition on removal, hold that such amendment has created no radical change and was merely intended to give prompt notice to the adverse party that a transfer was being taken; some of the authorities even holding that the purpose is to give the adverse party an opportunity to appear in the state court and contest the removal.

Goins v. So. Pac. Co., 198 Fed. 432.
Hansford v. S.-O.-W. Co., 201 Fed. 187.
In re Kramer, 209 Fed. 627.
Potter v. G. B. Co., 213 Fed. 698.
Cropsey v. S. P. & P. A., 215 Fed. 132.
2 Foster's Fed. Practice, p. 1829, note.

III.

The State Court is not bound to surrender its jurisdiction on the filing of a petition and bond for removal unless the petition in connection with the pleadings shows that the petitioner has a right to the transfer, and until such showing is made, the State Court is not prohibited from proceeding further in the suit.

P. Ins. Co. v. Pechner, 95 U. S. 183.
Armory v. Armory, 95 U. S. 227.
N. O. Ry. Co. v. Miss., 102 U. S. 135.
Nat. S. Co. v. Tugman, 106 U. S. 118.
Gregory v. Hartley, 113 U. S. 742.
Stone v. State of S. C., 117 U. S. 434.
B. Ry. Co. v. Dunn, 122 U. S. 513.

Crehore v. O. M. R. Co., 131 U. S. 240.
Penn. Co. v. Bender, 148 U. S. 255.
C. & O. R. Co. v. McCabe, 213 U. S. 207.
Brown v. Nelsin & Co., 43 Fed. 616.
Springer v. Howes, 69 Fed. 850.
Monroe v. Williamson, 81 Fed. 984.
Dalton v. M. M. I. Co., 118 Fed. 881.
Donovan v. W. F. & Co., 169 Fed. 363.
Phillips v. W. T. C. Co., 174 Fed. 873.
Mannington v. H. V. Ry. Co., 183 Fed. 133.
Stevenson v. I. C. R. Co., 192 Fed. 956.

ENCYCLOPEDIAS AND TEXT BOOKS.

Dillon's Removal of Causes, Sec. 139.
Faust on Federal Procedure, 579.
Moon's Removal on Causes, Sec. 177.
2 Foster's Fed. Prac., Sec. 391.
10 Ency. of U. S. Sup. Ct. Reps., 704-5.
18 Ency. P. & P., 388, 351.
34 Cyc., 1305, 1308.
A Federal Equity Suit (Simpkins), 806.

IDAHO CASES.

Finney v. Am. Bonding Co., 13 Ida. 534.
Mills v. Am. Bonding Co., 13 Ida. 556.
Morbeck v. Bradford-Kennedy Co., 19 Ida. 83.
State ex rel. Mills v. Am. Sur. Co., 26 Ida. 652.
State v. T. G. & S. Co., 27 Ida. 752.

IV.

Since the adoption of the Judicial Code, the courts have held as before, to-wit:

"If, on the face of the record, including the petition for removal of a cause, the suit does not appear to be a removable one, the state court is not

bound to surrender jurisdiction, but may proceed as if no application for removal had been made."

M., K. & T. Ry. Co. v. Chappell, 206 Fed. 688.
C. of M. v. Postal T. C. Co., 218 Fed. 471.
Miller v. Soule, 221 Fed. 493.
State I. D. Co. v. Leininger, 226 Fed. 884.
Cropsey v. S. P. & P. A., 215 Fed. 132.
Hansford v. S. etc. Co., 301 Fed. 185.
Loland v. N. W. S. Co., 209 Fed. 626.
St. John v. U. S. etc. Co., 213 Fed. 685.
Johnson v. Butte etc. Co., 213 Fed. 910.
I. C. R. Co. v. Bacon, 236 U. S. 304.
Goins v. So. P., 198 Fed. 434.

V.

Law courts have jurisdiction over suits brought under Secs. 295, 296, Idaho Revised Codes, and judgments at law are valid.

State v. T. G. & S. Co., 152 Pac. 189 (Ida.)
State ex rel. Mills v. Am. Sur. Co., 145 Pac. 1097 (Ida.)
Carozza v. Peo. Sur. Co., 131 N. Y. Supp. 448.
Alessandro v. Peo. Sur. Co., 127 N. Y. Supp. 572.
Musco v. United Sur. Co., 117 N. Y. Supp. 21.
U. S. v. Wells, 203 Fed. 146.
U. S. v. Am. Sur. Co., 110 Fed. 913.

VI.

A judgment obtained in the State Court before an equitable action is started in the Federal Court for a pro rating will not be considered invalid in the equity court and the claim, which has been merged in the judgment, will not have to be proved again. Pay-

ment on such judgment will be made to the extent of pro-rate amount.

U. S. v. Am. Sur. Co., 126 Fed. 811.
U. S. v. Am. Sur. Co., 110 Fed. 913.
Am. Sur. Co. v. Lawrenceville Cement Co., 110 Fed. 717.
Ill. Sur. Co. v. Mattone, 122 N. Y. Supp. 928.
Cappadonna v. Ill. Sur. Co., 125 N. Y. Supp. 162.
Carson v. City etc. Sur. Co., 73 Atl. 425 (Pa.)

VII.

A judgment establishing the relation of creditor and debtor is conclusive against all parties.

Black on Judgments, § 605.
Freeman on Judgments, §§ 334-7.
Bigelow on Estoppel, 167-8.
Freeman on Executions, § 136.
Bump on Fraudulent Conveyances, 576-7.
Wait on Fraudulent Conveyances, § 270.
Bensimer v. Fell, 29 A. S. R. 774.
Weaver v. Haviland, 40 A. S. R. 631.
Alkire v. Richesin, 91 Fed. 76.
Ledoux v. Bank of Am., 48 N. Y. Supp. 771.
Moore v. Curry, 106 Ala. 284.
Hersey v. Benedict, 15 Hun. 282.
Sidensparker v. Sidensparker, 52 Me. 481.
Candee v. Lord, 2 N. Y. 269.

VIII.

Judgments which have been secured before proceedings in bankruptcy, receiverships, creditors' suits, and administration of estates, are conclusive in such proceedings.

Central T. Co. v. Charlotte etc. Co., 65 Fed. 262.
Collier on Bankruptcy, 861 (10th ed.).
Remington on Bankruptcy, §682.
In re Engle, 5 A. B. R. 373.
In re Pease, 4 A. B. R. 547.

ARGUMENT.

The Bill of Complaint herein is purely an original bill in equity. It brings into the Federal Court three groups of parties as defendants, which are plaintiffs in three separate actions at law, as follows:

1. The action of Mills et al. (about 54 others) vs. American Surety Company, brought in the State Court in Blaine County, Idaho, wherein judgment has been recovered.

2. The action of Dithmer et al. (about 14 others) vs. American Surety Company, now pending in the State Court in said Blaine County.

3. The action of Leonard vs. American Surety Company, now pending in the Federal Court in Idaho.

All of the above actions were brought against said Surety Company as surety on the official bond of a former Bank Commissioner of the State of Idaho, for his failure to faithfully discharge the duties of his said office.

The liability arose on August 31st, 1910. The actions were commenced as follows:

1. The Mills action on August 31st, 1912.
2. The Dithmer action on August 30th, 1913.
3. The Leonard action on August 30th, 1913.

In the Mills et al. action the said Surety Company, in due time, filed its petition and bond for removal to the Federal Court and gave written notice thereof. But it failed and refused to appear in said action by demurrer or otherwise within the time allowed by the statutes of Idaho. Default of said Surety Company for failure to appear was duly entered. The Federal Court, upon motion of plaintiffs, remanded said action to the State Court. Said Surety Company then made its application to set aside said default on the ground of accident and mistake; counsel claiming that under § 29 of the Judicial Code the defendant was not required to appear in the State Court until after the action was remanded.

The said application was opposed by said Mills et al. and after a hearing thereof denied by said State Court. Said Mills et al. offered their proof and judgment was duly entered in their favor on May 20th, 1913, which was several months prior to the commencement of the Leonard and Dithmer et al. actions.

The complaint herein, filed on May 6, 1915, is for the purpose of restraining the enforcement of the said judgment of Mills et al., until the other two actions have gone to judgment, and then have an accounting between all parties, provided the judgments exceed the sum of $50,000, the penal sum of the bond, and determine the pro rata share of each.

The Bill of Complaint attempts to give the Federal Court jurisdiction, upon two grounds, as follows:

1. Accident and mistake in the entry of said default in the Mills et al. action; counsel here

claiming the same as they claimed in the State Court that under § 29 of the Judicial Code the defendant was not required to appear in the State Court until after the action was remanded.

2. Equitable pro-rating, provided judgments, after a final determination thereof in the pending actions, exceed penal sum of bond.

POINTS RAISED IN APPELLANT'S BRIEF.

The argument of appellant is set forth under three headings which may be briefly stated as follows:

1. That courts of equity will enjoin the enforcement of unconscionable judgments.
2. That compliance with § 29 Jud. Code terminates the jurisdiction of the State Court until case is remanded.
3. That the Federal Court has jurisdiction to require a pro-rating.
   a. That a surety who then pays any claimant more than his pro-rate share does so at its peril.
   b. That then each claimant is entitled to be heard on the amount and validity of other claims.

We will discuss the above in their order.

AS TO COURTS OF EQUITY ENJOINING THE ENFORCEMENT OF UNCONSCIONABLE JUDGMENTS.

We conclude from the short paragraph only in appellant's brief on this point, without the citation of any authorities whatever, that it does not believe that there is any merit whatever in its contention.

We desire to have it understood that we accept the well established law that a Federal Court has juris-

diction over an independent equitable action to afford relief against a judgment at law of a State Court obtained by fraud, accident or mistake, where extrinsic evidence is required to show such fraud, accident or mistake. There are many federal cases recognizing such jurisdiction of a Federal Court, and in fact, such actions have been so litigated that the essential elements necessary to sustain such jurisdiction have become settled and universally recognized. These essential elements may be classed as follows: (1) Federal jurisdiction; (2) an equitable ground, as fraud, accident or mistake; (3) no adequate remedy at law; (4) meritorious defense; (5) laches. We could cite many authorities holding that these elements must all exist in such an action, but we do not deem it necessary as this Court has passed upon cases of this kind in several instances. One of the essential elements which alone will defeat the action herein on the ground of mistake, is that the Complaint on its face shows not only that the party had an adequate remedy at law but that he pursued the same.

The Complaint herein attempts to set up two equitable grounds upon which a Federal Court would grant relief against the enforcement of a judgment at law, as follows:

1. That a pro-rating is necessary.
2. Mistake in allowing a default judgment to be taken.

The lower court, in the action at bar, held that it had jurisdiction on the theory of equitable pro-rating, but that it did not have jurisdiction on the

ground of mistake wherein the default judgment had been entered in the State Court. In passing on the question of the complaint being sufficient in seeking to attack the validity of the judgment obtained in the State Court on the ground of mistake, said court disposes of this phase of the question in brief order, as follows:

> "At the close of the oral argument I intimated the view, which I still entertain, that the plaintiff cannot in this proceeding attack the validity of the judgment obtained in the State Court by Mills and her associates. No actionable fraud is pleaded, and if it were assumed that the State Courts committed error in entering judgment by default before the motion to remand had been disposed of in this court, such error cannot be corrected in a suit of this character. There must be an end of litigation, and the only remedy available to the plaintiff is such as is afforded by appellate proceedings. I therefore put this branch of the Bill of Complaint on one side as in no wise tending to support our jurisdiction."

We believe that the court was correct in its conclusion that such a contention of appellants was without any merit, and that it would waste no time upon the same. The allegations in the complaint are to the effect that in the Mills action in the State Court a judgment by default was entered; that appellant claims it was wrongfully entered through accident and mistake; that said default was entered while it was proceeding under § 29 of the Judicial Code to remove the action to the Federal Court; that it was

not necessary for it to plead in the State Court, within the time required by the law of the state, even in a case that was not removable, while defendant was attempting to remove the cause; that the clerk had no right to enter the default, even after the statutory time of the state law to plead had expired, until action was remanded; that an application was made by the defendant in the State Court to have said default set aside on said grounds; that counsel for appellant contested said application and that then the State Court refused to set aside said default.

Under such allegations in the Bill it is hardly surprising that the lower court at once came to the conclusion that the Surety Company, plaintiff herein, had an adequate remedy at law and pursued the same, and that if it desired to contest the matter further it should have been by appeal to the Supreme Court of the State. While the Complaint does not allege the further facts at the time the Bill herein was filed, an appeal had been taken to the Supreme Court of the State on these very questions of the default being entered by mistake and the construction of § 29 of the Judicial Code, etc., and had been heard and decided by said Supreme Court, such are the facts as is shown by the decision of the Idaho Supreme Court, cited by appellant in its brief, State ex rel. Mills v. American Surety Company, 26 Idaho 652. And if this court cares to examine said case, it shows how fully that court went into these matters and decided the same. And we might also add that said Surety Company then obtained a writ of error

to the Supreme Court of the United States to the Supreme Court of the State, and the same is now pending before that Court, and the assignment of errors covers the same questions that appellant now seeks to raise before this court as to the entry of the default and the construction of § 29 of the Judicial Code.

So far as the matters of the default and the construction of said § 29 being res adjudicata are involved herein, it makes no difference whether the said Surety Company appealed to the Supreme Court of the State or whether it then obtained a writ of error from the Supreme Court of the United States. The law is well settled that if the party had an adequate remedy at law and pursued the same in the State Court, he then has had his day in court and he cannot then ask for relief in any other court upon the same ground. If he makes an application to set aside the default upon said grounds and then does not appeal to the Supreme Court of the State, then of course the judgment of the District Court is final and conclusive; again, if he desires to appeal and does so, and the Supreme Court sustains the District Court, then that judgment of the Supreme Court becomes final and conclusive, unless an appeal is then taken to the Supreme Court of the United States. In other words, it makes no difference, after one pursues his remedy at law, where he stops or what appeals he takes. And so in the case at bar the complaint on its face showing that a motion was made to vacate the default in the District Court upon the same grounds as are set

forth in the complaint herein, makes these matters res judicata and conclusive.

A party is entitled to his day in Court in attacking the validity of a judgment. He can attack it in the same action at the time of the trial, by motion, or by appeal, or he can attack it in a separate action to vacate, provided he lost his remedy at law by no fault of his own; but when he has done this in either case, he is bound by the final determination of his action. He cannot again attack its invalidity and have it tried over again in some other court. He can have his day in court to attack the judgment as being invalid, but when this has been done, the judgment is final and the same issues cannot again be tried, but are res adjudicata.

The Surety Company attacked the invalidity of the entry of default on certain grounds in a State Court which had concurrent jurisdiction with the Federal Court of such matters and therefore it is bound by the decision of the State Courts. Never again can it attack the invalidity of said entry on the same grounds in any other court.

We admit the rule of law that the validity of a default judgment can be questioned, but we do not admit that it can be questioned a dozen times, or tried until determined in favor of the attacking party.

Courts will not re-examine questions of the validity of a judgment rendered by another court for purpose of determining whether the decision was correct, either according to the principles of law or those of equity. If the court had jurisdiction of the subject

matter and person, the party has had his day in court and he must correct the error on appeal or the judgment will stand against him. It is the duty of a litigant to make every defense available and assert every right he has in the trial court and urge any correction he may desire on appeal. If he fails so to do, it is his own fault, and if he does raise them, they become final and another court cannot aid him at some future time on the matters formerly in issue.

We do not intend to burden this brief with many citations of authorities or quotations therefrom setting forth the rules as to res adjudicata. The cases are so numerous in holding that matters or issues which have been determined in the original action by a motion, or have been urged on appeal or by writ of error are conclusive and res adjudicata, that it would be imposing upon this court to cite all such cases for your consideration.

We will, however, give the universal rule as so well set forth in I Black on Judgments, Sec. 362, as follows:

> "The liberal practice of the courts in granting new trials and entertaining motions to vacate or open their own judgments, and the enactment of statutes in many of the states authorizing the setting aside of judgments taken against a defendant 'through his mistake, inadvertence, surprise, or excusable neglect,' have considerably abridged the province of equity in giving relief by injunction. And the rule is generally adhered to, as the more safe and conservative principle, that equity will not grant relief against an execution if the

party can equally well be relieved, on motion to open, vacate or modify the judgment, or to stay or quash the execution, in the court which issued the execution or has control of it. * * * * Equity will refuse to act by injunction when the grounds alleged have already been considered and held insufficient on a motion at law; in such case the whole matter res judicata and equity will not re-open it."

Among the numerous authorities supporting such rule are the following:

23 Cyc. 1017.
1 Whitehouse Eq. Prac. § 152, note 59c.
1 High on Irrig., § 226.
U. S. v. Anderson, 169 Fed. 205.
Hendrickson v. Bradley, 85 Fed. 508.
Wilson v. Buchanan, 170 Pa. 14.
Matson v. Field, 10 Mo. 100.
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Collins v. Butler, 14 Cal. 223.
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Hoffman v. Burris, 71 N. E. 584.
Hartness v. Brown, 59 Pac. 490.

HAD A FURTHER ADEQUATE REMEDY AT LAW.

The Complaint shows said Surety Company tried its remedy at law and still had two others, an appeal to the Supreme Court, and a writ of error from the Supreme Court of the United States. If it be a fact that such appeals were not taken, then it must ac-

count for a failure to pursue such remedies. Under this principle of an adequate remedy at law in actions like the one at bar, we again find that the rules in relation thereto are so well settled as to warrant little or no controversy. If a remedy at law exists, it must be pursued. One may have several concurrent remedies at law, as a motion for a new trial, a motion to vacate in an original action, an appeal, writ of error, writ of review, etc. The best rule as sustained by a great weight of authority is that the party must first exhaust all his remedies at law. So the first question to determine is: Has time for remedy at law expired? If the time for prosecuting his remedy at law has expired, then the next question is: Why? If by his own or counsel's fault, neglect, inattention, mistake in law, etc., then equity will not grant relief. And so it is necessary in actions of this kind, to restrain the enforcement of the judgments of a State Court, for the plaintiff to allege and show that he had no remedy at law, or, if he had one, he lost same through no fault or neglect of his own. The allegations in the complaint show that the same questions as to the default judgment were raised in the original action, and the failure to show whether such remedy was further pursued, or, if it was lost, that it was not through the fault or neglect of said Surety Company or his counsel, leaves the said judgment final and conclusive.

UPON THE FILING OF A PETITION AND BOND FOR REMOVAL DOES §29 OF THE JUDICIAL CODE TERMINATE THE JURISDICTION OF THE STATE COURT IN AN ACTION WHICH IS NOT REMOVABLE?

Appellant has sought to convince several different courts at different times in the Mills actions that § 29 of the new Judicial Code has brought about a most wonderful change in procedure for removals. It contends that it should be construed so as to overrule the unanimous line of federal authorities which have established the law as to when State Courts can proceed on removal proceedings and when not. All the courts to which such a contention has been presented have held that there was nothing whatever in such a contention, and without hesitation followed the plain wording of said Section 29. And as this very question of the construction of said Section 29 is now pending before the Supreme Court of the United States on appeal from the very Mills et al. judgment which the appellant is attacking in the present action, it does not seem right that appellant should seek to take up the time of this Court on a decision of this question.

We most respectfully call the Court's attention to the fact that the complaint herein on its face shows that the very identical question in the Mills action itself, to-wit, the construction of said Section 29, was raised, heard and determined by the State Court. We therefore submit that all of our argument on the question of the entry of the default being res judicata is applicable here. And we sincerely urge that

it is not proper for another Court except on appeal to pass upon the same question as already passed upon by the State Court, and we believe that this Court will dispose of this question in brief order as was done by the lower court.

Appellant contends that the Judicial Code has so changed the former law on removals that a defendant can file a petition and bond on removal and give notice, either in a suit which is removable or which is not removable, and then the jurisdiction of the State Court ceases until the action is remanded, if it is one that is not removable. Appellant first quotes the old Section 3 and then the new Section 29, and then seeks to show that a most radical change is intended, but it fails to cite one single case to show that the law has been altered in any way in respect to the question which is now presented to this Court. It cites three decisions of the Supreme Court of the United States which were decided prior to 1873 and would have this Court believe that said decisions, touching upon the jurisdiction of State Courts on removal, would support a case which was not in fact removable. We have examined these three cases and find that in each instance they were cases where the cause was a removable one, and that when the matter was presented to a Federal Court it was so held. Therefore, in each instance the court properly held that the State Court could not proceed in a case that was removable after the filing of a proper petition and bond. The appellant then seeks to show this Court that in the case of Phoenix Ins. Co. vs. Pechner,

27 L. ed. 427, that the Supreme Court seemed to have a change of heart, and without any reason established a new rule that a State Court could proceed after the filing of a petition and bond in a case which was not removable. Appellant then admits that this case has been followed by many cases. We would go still further and say that it has been followed by every Federal Court and every federal decision and every text-writer treating on the question and also by all the encyclopedias and all the State Courts. Appellant's first error, therefore, arises when it seeks to show that the Supreme Court of the United States made any departure at any time, and if counsel would read the three decisions cited, in the light that those three actions were determined to be removable actions, then they would have a unanimous line of decisions on this question.

The amendments of 1887 and 1888 to the Judiciary Act of 1875 were intended to restrict and do restrict the right of removal from the State Courts. Section 1 of these amendatory acts defines the jurisdiction of the former Circuit Courts of the United States. Section 2 provides what causes may be removed from the State Courts to the Federal Courts. All cases are not removable. Therefore, to receive the protection of the federal statutes on the removal of causes, one must bring himself within the limitations and seek only to remove a cause that is removable, but appellant herein is seeking equal protection for an action that was not removable. This would be placing in a defendant's hands the power of extending his time

to plead or answer in State Court. It would be making his desire superior to the provisions of the state statute. Under such a procedure, if a defendant was not ready to plead or answer, he could file a petition which on the face thereof showed that the cause was not removable, and by such a petition stop the procedure in the State Court and force the plaintiff to proceed in the United States Court to have the cause remanded before defendant could be required to plead. Such a rule would render state statutes, on appearance and answer, of no force and effect.

The very wording of the U. S. statute on removal, Sec. 29 (New Judicial Code), similar to Sec. 3 of old statutes, prohibits in direct words the very thing that appellant herein contends for. The wording is as follows:

> "Whenever any party ENTITLED TO REMOVE ANY SUIT mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State Court to the District Court of the United States, he may make and file a petition duly verified * * * for the removal of such suit into the District Court to be held in the district where such suit is pending, and shall make and file therewith a bond, etc. * * * It shall THEN be the duty of the State Court to accept said petition and bond and proceed no further in such suit."

It is readily apparent that said section applies only to suits that are removable as the opening words, "WHENEVER ANY PARTY ENTITLED TO RE-

MOVE ANY SUIT" shows that the party must upon the face of his petition present such a showing as will bring him within the class of cases that are removable. If he cannot do this, the State Court is under no obligation to accept his petition and bond. The statute does not provide that "Whenever any party entitled to remove, or not entitled to remove any suit, etc." If it did, then no matter what the petition showed, whether the suit was removable or whether it was not removable, the State Court would have to accept the same. But the statute only deals with those suits which a party is entitled to remove and then provides: "It shall THEN be the duty of the State Court to accept said petition and bond and proceed no further in such suit." The words "It shall then be the duty, etc.," plainly refer to the first line of said section, to-wit: "Whenever any party entitled to remove any suit, etc." It is then (in a suit which the party is entitled to remove), and then only, that the State Court shall accept the petition and proceed no further in the suit, and if the petition fails to so show (that the suit is one which the party is entitled to remove), then the State Court need not accept the petition, but can proceed further in such suit. It is so apparent that this clause is only applicable to suits which a party is entitled to remove that it seems hardly possible for any one to make any other contention. To argue that a party can file any petition he may desire, even showing upon the face of the petition that the cause is not removable and by so doing prevent the State Court from proceeding any further

in such suit is beyond all reason and cannot be considered in a serious light.

Many of the cases, in treating of the effect of removal, state the rule as follows: "Upon filing the *required petition* and bond *in a removable case* the jurisdiction of the State Court comes to an end."

This is the true rule and requires the petition to show that there is a cause which the party is entitled to remove. Any other rule is a clear violation of the United States statutes on Removal of Causes.

In Phoenix Ins. Co. vs. Pechner, 95 U. S. 183, 24 L. ed. 427, the Court states as follows:

> "This right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes a part of the record in the cause. It should state facts, which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot 'proceed further with the cause.' Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the cause has been suspended."

The following cases also touch directly on the clause in said § 29 as to the duty of State Court "*to proceed no further*" and in construing same hold that it is only applicable to a suit which a party is "entitled to remove:"

N. O. M. & T. R. R. Co. v. Miss., 102 U. S. 135, 26 L. ed. 96.

Stone v. S. Car., 117 U. S. 430, 29 L. ed. 962.
Crehore v. O. & M. R. Co., 131 U. S. 240, 33 L. ed. 145.

The amendments made in said Section 29 cover the following matters:

1. As to when record should be filed in the Federal Court.
2. As to service of written notice of the filing of petition and bond upon the adverse party.
3. As to the time to plead.

We will treat of the above in their order.

AS TO FILING RECORD IN FEDERAL COURT.

Section 3 of the old law provided that bond should be given conditioned that the party removing would enter a copy of the record in the Federal Court "on the first day of its then next session."

Section 29 of the Judicial Code provides for the entering of such record in the Federal Court, "within thirty days from the date of the filing such petition." It is readily seen that this amendment was to fix a definite period for the filing of a copy of the record in the Federal Court. Under the old law the first day of the next session might be within a few days of the filing of the petition and not give sufficient time for the preparation of a copy of the record, and again the first day of the next session of the Federal Court might not be until several months after the filing of the petition in the State Court. So it is quite evident that the intention of the amendment was to make certain that which theretofore had been uncertain in time.

AS TO SERVICE OF WRITTEN NOTICE ON ADVERSE PARTY.

The old law did not require that the adverse party should be notified in any way of the filing of the petition and bond. Generally the proceeding was ex parte and there was no statutory right to a hearing under the form of practice. The petition and bond would be presented to the State Court. It was the duty of the State Court to examine the same and determine therefrom whether or not, in its opinion, a sufficient petition and bond had been filed, and whether the petition showed that the party seeking to remove was entitled to have the suit removed. The court in many instances would refuse to order a removal as is shown from the numerous cases where the State Court refused to relinquish its jurisdiction but proceeded further in the case. In some instances the adverse party was advised of the filing of petition and bond for removal and would be given a hearing, and the State Court then refuse to order a removal, but proceeded further in the action. As we understand the former removal statute, no order was necessary by the State Court either ordering or refusing removal. It did not effect the right of the defendant to proceed and file a copy of his record in the Federal Court and have that court pass upon his petition. But the State Court, if of its own motion or with the assistance of counsel for the adverse party, became satisfied that the action was not removable or that the petition and bond were insufficient, would then refuse to stay the proceedings in the State Court and proceed to trial. There seems to be some conflict

between the federal authorities as to just what was the intention and purpose of said Section 29 requiring written notice to be given the adverse party. The question arises: Does such provision contemplate a hearing, and is the notice required so that the adverse party could appear and contest the removal? Some of the decisions so hold, while others hold that it was doubtless the purpose of the amendment to give the adverse party prompt notice of the exercise of the right of removal, and that it was not clear that the provision had any other purpose.

In Goins vs. Southern Pac. Co., 198 Fed. 432, in passing upon the purpose of the requirement under Sec. 29 of preliminary notice, the Court states:

> "Without the effect of materially changing the method of procedure, it will tend to protect the parties and the courts as well, not alone against mistakes and delays in proceedings genuinely instituted, but against unwarranted and frivolous attempts to exercise the privilege in instances where no real right exists. And, speaking in a general way, I entertain little doubt that it was for reasons such as indicated in the class of cases referred to that the requirement of notice has been prescribed."

In Hansford v. Stone-Ordean-Wells Co., 201 Fed. 187, it is held:

> "Whatever the purpose of notice, the removal act seems to require no more. The statutory notice would seem calculated to serve no purpose but to advise the plaintiff that the suit and all future proceedings therein are about to be trans-

ferred to another tribunal, to submit to his scrutiny the sufficiency of the petition and bond, and to enable him to speed proceedings if the defendant delays therein."

In the case of In Re Kramer, 209 Fed. 627, it is held:

"This notice is a matter of substance; and, since the right of removal is statutory, all the requirements of the statute must be followed in order to effect the transfer. A prior written notice is therefore an essential step in the proceedings. The purpose of the statute is that the adverse party shall be advised of the intention to file such petition and bond in order that he may have an opportunity to appear in the State Court and resist the removal if he so desires."

In Potter v. General Baking Co., 213 Fed. 698, it is held:

"It is contended that the purpose of the provision is that the adverse party shall be advised of the intention to file such a petition and bond, in order that he may have an opportunity to appear in the State Court and resist the removal, if he so desires. * * * * It was doubtless the purpose of the amendment to give the adverse party prompt notice of the exercise of the right of removal, and it does not seem clear that the provision had any other purpose."

In Cropsey v. Sun Printing, etc., Ass'n, 215 Fed. 132-3, it is held:

"The plaintiff does not disclose, and it is not apparent, what better purpose would have been

served, or what greater advantage she would have gained, had the notice stated the exact time when such petition and bond were to be filed. If, as suggested, the legislative purpose was to 'give the adverse party an opportunity to be heard as to whether the petition and bond were "requisite,"' that opportunity was as available to the plaintiff by the notice given as if the exact time when such petition and bond were to be filed had been stated. * * * * While the requirement of Jud. Code, § 29, for the service of notice of intent to file a removal petition and bond is mandatory and jurisdictional in a limited sense, *such requirement does not change the respective powers of the State and Federal Courts with reference to jurisdiction to ultimately determine the validity of removal proceedings.*"

In 2 Foster's Fed. Practice, p. 1829, note, it is stated:

> "Previously to the Judicial Code, no notice to the plaintiff was required, this seems to give to plaintiff a right to a hearing in the State Court before the removal asked."

We believe the foregoing to be all of the authorities which have discussed, since the adoption of the Judicial Code, that part of said Sec. 29 relating to the giving of notice to the adverse party. These authorities show that some of the courts are of the opinion that the requirement has not changed the procedure in any material way, and that the purpose thereof is to advise the plaintiff that the suit and all further proceedings therein are about to be transferred to

the Federal Court; while other courts seem to be of the opinion that such an amendment was for the purpose of notifying the plaintiff of the removal and giving him an opportunity to appear in the State Court and resist the removal if he so desires. On the other hand, there are no authorities whatever which support the radical view of appellant herein that it was the intention of Congress, by the adoption of said Section 29, to prevent the State Court, upon the filing of a petition, sufficient or insufficient, or in an action removable or not removable, from refusing to proceed further in the action. The mere requirement that notice be given cannot be deemed, even under a strained construction, to have further changed the whole procedure on removals in regard to rights and duties of the State and Federal Courts respectively on removal proceedings, and now require that the State Court proceed no further, even where the petition is not sufficient and the action is not removable.

AS TO TIME TO PLEAD.

The defendant contends that the mere filing of a petition for removal will oust the State Court of, or at least suspend, its jurisdiction and that the defendant is not required to appear and answer in the State Court until after the question of removability is passed upon by the Federal Court. In other words, that a defendant can attempt to remove a case not removable and by the mere filing of a petition for removal stop the proceedings of the State Court and thereby extend its time to appear and answer although the

State Court refuses to enter an order for the removal.

We think there is no merit whatever in such a contention, for the reason that not a single case is cited in appellant's brief so holding, while on the other hand, the decisions are unanimous to the effect that the State Court cannot be deprived of its jurisdiction unless the petitioning party can allege such facts in his petition as will show on its face that the cause, which he is seeking to remove, comes within one of the classes enumerated in the federal statutes.

Part of said Sec. 29 of the New Federal Code provides:

> "The said copy (certified copy of record), being entered within thirty days as aforesaid in said District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer or demur to the declaration or complaint in said cause."

This provides simply for the appearance of a defendant in the U. S. District Court in a removable suit, and the demurrer or answer is filed in that Court. If the cause is remanded, the demurrer does not go back to the State Court and, therefore, in such a case, a demurrer or appearance must have been filed in the State Court within the time required by the state law.

The contention of counsel for appellant, that Congress intended, by the new Code, to provide an orderly procedure until the question of jurisdiction could be determined, is of no force whatever, as the ques-

tion of jurisdiction, prior to and since the new Code, could and can be determined in an orderly procedure. All the defendant has to do is to file a demurrer in the State Court with his petition for removal, then he is protected from a default, and he waives no rights whatever, and he can then proceed and have the question of jurisdiction passed upon in the proper way. A requirement of the defendant that he respect the state laws in a case which is not removable, will not have the effect claimed by appellant, of fostering unseemly conflicts.

What argument is there in favor of permitting the federal law to control the appearance of a defendant in a State Court, if the Federal Court does not have jurisdiction of the action?

That part of Section 29 of the Judicial Code, as to appearance within thirty days in the U. S. District Court, does not, and was not, intended to make the change contended for by appellant. No change is made, except to make the time certain when the defendant should appear in the U. S. Court *in an action which was removable*, instead of leaving it uncertain, as was the case under the old law, where it was left to the practice in the different districts, where various rules were adopted, such as at the time of the filing of the petition, or making the time begin to run from the filing of the record in the U. S. Court, or giving the balance of the time after the record is filed.

The "unseemly conflicts," referred to by appellant, between the State and Federal Courts over the trial

of cases, would not be, and is not, eradicated by fixing a definite time to appear in the U. S. Court. The State Court can still refuse to relinquish its jurisdiction just the same, and proceed to trial, in an action which it believes is not removable, prior to the acceptance of jurisdiction by the Federal Court, regardless of the definite time to appear, as provided in the New Judicial Code.

It is a strange doctrine indeed to advocate, that a Federal Court, without jurisdiction, can stop a lawful procedure of a State Court, which has jurisdiction, and thus virtually set aside a state law as to time of appearance, and extend the time an indefinite period. A defendant could then refuse to pay any attention to a state statute on appearance, and if he wished more time than the 20 to 40 days allowed, and wanted to delay the action, all he would have to do would be to file a petition for removal, and the action would be in abeyance in the State Court, even if the necessary jurisdictional amount or diversity of citizenship did not appear.

If an action is removable, then it makes no difference whether the State Court orders the removal or whether it does not. If it signs an order, then of course, there can be no further proceeding in the State Court. The plaintiff must then move to remand. And if the Federal Court holds the case is removable, it must then go to trial in that Court. If, however, the Court refuses to enter an order for removal and proceeds in the trial of the action, then the defendant can, nevertheless, file his record in the

Federal Court and have the Federal Court pass upon the question of removability. If the Federal Court holds that the action is removable, then all the proceedings in the State Court, after the date of the filing of the petition, would be void. In such a case the rights of the defendant would not be affected, even if he had failed to appear by demurrer or otherwise in the State Court. It would be sufficient for him to make his appearance in the Federal Court within 30 days after the filing of the record in the Federal Court.

Now, if the defendant seeks to remove an action which is not removable, it may be that the State Court will sign an order of removal. Then the plaintiff must move to remand.

Again, the State Court may, upon an examination of the petition, deem the same insufficient, or be of the opinion that the action is not removable, and refuse to relinquish its jurisdiction.

We now are considering the particular class applicable to the question before this Court. The action was not removable and this point is not open to argument for the reason that both the State Court and the Federal Court have held that the same was not removable. Such being the case, what were the rights of the plaintiff and the defendant in said Mills action in the State Court? The plaintiffs brought an action which could only be tried in the State Court. They were entitled to have their action governed and tried by the state laws. This could only mean that the defendant Surety Company must have appeared and

answered within forty days after being served with summons. The Surety Company did not do this, however, and instead of filing a demurrer with its petition for removal, as is usual and customary, it sought to transfer a cause into the Federal Court which was not removable. The real question then is: Could the defendant, by such a mistake, secure months of additional time by litigation over motions to remand and motions to set aside the default, and then ask the court to excuse it and set aside the proceedings which were legally had in the State Court? We contend, under such circumstances, that there is no question as to the validity of the proceedings of a State Court after it has refused to relinquish its jurisdiction of an action which is not removable, and further, that the authorities fully sustain this proposition.

If we are right in our contention, then the Mills action in the State Court was not a removable one and the complaint and petition failed to show that the defendant was entitled to a removal of the cause. The matter was presented to the State Court and the Court held that the cause was one which could not be removed and an order was thereupon entered refusing to remove the same. The State Court, having concluded that the petition failed to show that the cause of action was removable, then had the right to proceed and even try the action, if it so desired, and unquestionably, under the universal law, all proceedings by the State Court are then valid. The only thing that could possibly defeat and nullify the proceedings in the State Court, after it refused to re-

linquish its jurisdiction, would be a contrary ruling by the United States District Court when the matter was presented to it. If that Court had refused to remand, then we would not contend that the proceedings in the State Court were valid. But where the Federal Court held that the cause was not removable, the same as the State Court, then the defendant was in error and could not ask to have any of the proceedings set aside that had been taken in the State Court. He must abide by the consequences of his wrongful act in seeking to remove said cause. There was no excuse for the defendant not protecting itself in the State Court as it is customary to file a demurrer and thus enter an appearance in the State Court at the time of filing the petition for removal and the United States cases are unanimous in holding that a defendant can thus proceed in the State Court and protect himself without waiving his right to have the question of jurisdiction and the removability of the cause passed upon by the Federal Court.

We will state the general rule and cite some of the leading cases decided prior to the adoption of the Judicial Code, to show the well established law under said Sec. 3 of the old law, and then follow same with a list of all of the authorities since the adoption of said Judicial Code, construing said Sec. 29, showing that there has been no change whatever in respect to the right of the State Court to proceed further in an action which is not removable.

The State Court is not bound to surrender its jurisdiction on the filing of a petition and bond for removal

unless the petition, in connection with the pleadings, shows that the petitioner has a right to the transfer, and until such showing is made, the State Court is not prohibited from proceeding further in the suit; and if the action is one which the party is not entitled to remove, the jurisdiction of the State Court is not ousted and its subsequent proceedings are valid.

P. Ins. Co. v. Pechner, 95 U. S. 183.
Amory v. Amory, 95 U. S. 227.
N. O. Ry. Co. v. Miss., 102 U. S. 135.
Nat. S. Co. v. Tugman, 106 U. S. 118.
Gregory v. Hartley, 113 U. S. 742.
Stone v. State of S. C., 117 U. S. 434.
B. Ry. Co. v. Dunn, 122 U. S. 513.
Crehore v. O. M. R. Co., 131 U. S. 240.
Penn. Co. v. Bender, 148 U. S. 255.
C. & O. R. Co. v. McCabe, 213 U. S. 207.
Brown v. Nelsin & Co., 43 Fed., 616.
Springer v. Howes, 69 Fed. 850.
Monroe v. Williamson, 81 Fed. 984.
Dalton v. M. M. I. Co., 118 Fed. 881.
Donovan v. W. F. & Co., 169 Fed., 363.
Phillips v. W. T. C. Co., 174 Fed. 873.
Mannington v. H. V. Ry. Co., 183 Fed. 133.
Stevenson v. I. C. R. Co., 192 Fed. 956.

ENCYCLOPEDIAS AND TEXT BOOKS.

Dillon's Removal of Causes, Sec. 139.
Faust on Federal Procedure, 579.
Moon's Removal of Causes, Sec. 177.
2 Foster's Fed. Prac., Sec. 391.
10 Ency. of U. S. Sup. Ct. Reps., 704-5.
18 Ency. P. & P., 388, 351.
34 Cyc., 1305, 1308.
A Federal Equity Suit (Simpkins), 806.

IDAHO CASES.

Finney v. Am. Bonding Co., 13 Ida. 534.
Mills v. Am. Bonding Co., 13 Ida. 556.
Morbeck v. Bradford-Kennedy Co., 19 Ida. 83.
State ex rel. Mills v. Am. Sur. Co., 26 Ida. 652.
State v. T. G. & S. Co., 27 Ida. 752.

As showing that there has been no change by said Sec. 29 of the new law, we will state that all of the Federal cases, passing upon the question of the State Court proceeding no further in the action, have put the same construction upon said section as was theretofore placed upon Sec. 3 of the old law.

The first case touching upon this point is Goins v. So. Pac. Co., 198 Fed. 434. The court in its decision refers to the accepted procedure under the old law as follows:

> "And while the State Court was not bound to surrender its jurisdiction upon a record which on its face did not in its judgment disclose a case for removal, its refusal was at the peril of having its judgment set aside by the Supreme Court of the United States, should its ruling prove erroneous."

It seems in that case that counsel for plaintiff took the position that said Sec. 29 intended to thereafter place the question of determining the jurisdiction on removal with the State Court and let that Court decide the question instead of the Federal Court. The Court stated emphatically that it was unable to assent to the contention that Congress intended to effect so radical a change, and then concluded that said section did not have the effect of materially changing

the former method of procedure, except by giving the plaintiff notice of the intended transfer. We might state that every case, since the adoption of the Judicial Code, passing upon this point, has followed the former decisions decided under the old section, and they are just as emphatic and use the same words in reciting the law as were used in the old decisions. We will content ourselves by grouping the authori. ties.

> "If, on the face of the record, including the petition for removal of a cause, the suit does not appear to be a removable one, the State Court is not bound to surrender jurisdiction, but may proceed as if no application for removal had been made."

M., K. & T. Ry. Co. v. Chappell, 206 Fed. 688.
C. of M. v. Postal T. C. Co., 218 Fed. 471.
Miller v. Soule, 221 Fed. 493.
State I. D. Co. v. Leininger, 226 Fed. 884.
Cropsey v. S. P. & P. A., 215 Fed. 132.
Hansford v. S. etc. Co., 301 Fed. 185.
Loland v. N. W. S. Co., 209 Fed. 626.
St. John v. U. S. etc. Co., 213 Fed. 685.
Johnson v. Butte etc. Co., 213 Fed. 910.
I. C. R. Co. v. Bacon, 236 U. S. 304.
Buxton v. P. L. Co., 211 Fed. 718.

Counsel for appellant seems to concede that up to the time of the adoption of the Judicial Code the rule had become well established that the State Court was not required to relinquish its jurisdiction upon the filing of a petition which did not show that the action was removable. The case of C. & O. Ry. Co. v. Mc-

Cabe, 213 U. S. 207, is cited for the purpose of showing that unless the State Court does relinquish in all instances, "unseemly conflicts" of jurisdiction will continue to arise. True, the Supreme Court states that in order to prevent unseemly conflicts of jurisdiction, it would seem that the State Court in such cases should withhold its further exercise of jurisdiction until the decision of the District Court of the United States is reviewed in the Supreme Court. Then the Court immediately adds:

> "Conceding that, except for the principle of comity, the State Court may decide the question of jurisdiction for itself * * * * "

This clearly shows that the Supreme Court still recognized that in order to protect the rights of both parties on removal it would not be proper to absolutely deny the right of the State Court to proceed in an action which it thought was not removable. And so the rule on removal as it then stood must, in order to protect the rights of both the plaintiff and defendant, always be the law. The Court has two rights to deal with, to-wit:

1. The rights of plaintiff to proceed in the State Court if the action is not removable.
2. The rights of defendant to have a removal, if the action is removable, regardless of the decision of the State Court.

Now if the court adopts the theory advanced by appellant herein, then the rights of plaintiffs must suffer in many instances. A petition for removal which is entirely insufficient and in an action which

on its face is clearly not removable, could be made the means of staying the State Court until the plaintiff could obtain an order from the Federal Court remanding the cause. There are so many attempted removals in suits which are not removable, that it would be a great injustice to plaintiff to require the State Court to absolutely relinquish its jurisdiction until an order remanding the cause had been made by the Federal Court.

Again appellant argues that if a party is seeking in good faith to remove a cause it works a great hardship to compel him to litigate his rights in two forums at the same time. Likewise, it is a great hardship for the plaintiff to go to the Federal Court and contest removal proceedings in an action which on its face is not removable, and meanwhile have his action stayed in the State Court.

And so it is, in order to protect the rights of both parties, that the law should stand as now well established by the federal decisions. And there is nothing whatever in the changes made in said Section 29 to warrant such construction as appellant contends for.

As bearing upon the construction of said Sec. 29, the appellant has copied in its brief the debate that took place in Congress when said section was under consideration. It is quite instructive, but as we read the same, it fails to sustain the contention of appellant in any manner. The debate that arose was caused by an amendment offered by Mr. Stanley. The reason he gives in support of the amendment appears on page 70 of appellant's brief. Mr. Stanley was of

the belief that in "every case" on removal, the question of jurisdiction should be settled in the State Court. He argued that such question could as well be adjudicated in the State Court and then an appeal taken therefrom. He made no distinction between an action that was removable and one that was not removable. He thought that justice would be more likely to be had by allowing the State Court to pass upon the right of removal.

Mr. Moon answered such argument by stating that the adoption of such an amendment would permit the State Court to go on and try the case and still allow the Federal Court, upon the filing of the petition, to take jurisdiction, thus giving both courts jurisdiction. Mr. Moon's reply is found on page 71 of appellant's brief and shows clearly that such a condition would arise in all actions whether they were removable or not. He concluded by stating that such an amendment would be utterly absurd. And such it would be, if the amendment of Mr. Stanley had been adopted, and it would have allowed the State Court to refuse to relinquish jurisdiction even in an action which was not removable.

Mr. Stanley replied as is shown on page 72, and still further showed his intention in having his amendment cover both actions which were removable and which were not. His argument was that if the action was a removable one, that then the defendant would have his remedy by appeal.

After setting forth said debate, appellant, on page 74, comes to the conclusion that the Stanley amend-

ment was for the purpose of allowing the State Court to retain jurisdiction of causes which were not removable. Here is where appellant is in error, as nowhere in the discussion can such an inference be drawn. The trouble with the proposed amendment was that it covered all cases whether removable or not and would thus allow the State Court to proceed in an action although it was removable. Appellant then adds:

> "Both sides conceded that, under the section as it was then before the House, the State Court could not retain jurisdiction even where the case was not removable."

Again, we state that appellant is in error in arriving at such a conclusion, as nowhere in the debate does it appear that either side conceded that the State Court could not retain jurisdiction in an action which was not removable.

So it appears that appellant is without any support whatever on its construction of said Sec. 29. All of the federal and state decisions are against such construction, not only the decisions rendered prior to the Judicial Code, but all decisions rendered since. And we submit that the debate in Congress on said section in no way assists appellant in its argument that the intention was by the simple amendments of making definite which theretofore had been indefinite, and requiring notice, to so change all the established law on removals as to deny the State Court the right of proceeding in an action which was not removable.

AS TO QUESTION OF FEDERAL COURT HAVING JURISDICTION TO REQUIRE A PRO-RATING.

Appellant takes up a great deal of space in its brief in an endeavor to show this court that in this class of cases the equitable theory of pro-rating should be required and that the Federal Court has jurisdiction in an action brought for such purpose.

It appears to us that the appellant is premature in seeking to sustain the lower court in retaining jurisdiction of the Bill on the theory of equitable pro-rating. This question was raised by our motions to dismiss, and is not involved in the present appeal.

Appellant should have confined its argument and brief to the matter which is now before this court, to-wit, an appeal from interlocutory orders refusing to grant the full injunctive relief prayed for. The plaintiff filed its Bill, to which certain defandants, the appearing appellees herein, filed motions to dismiss. Said motions to dismiss squarely raised the question of whether or not the Federal Court could take jurisdiction of the action herein and require a pro-rating. This question was argued pro and con to the lower court and it held that it had jurisdiction and denied the motions to dismiss. That ruling, of course, was against said defendants, appellees herein, but they are not now before this court raising the question that the lower court erred in holding that it had jurisdiction in the action herein. So this question of jurisdiction should be left for determination at the proper time, to-wit, upon an appeal, if one

be necessary, by said defendants after a trial upon the merits.

It seems that appellant, in its brief on an appeal from interlocutory orders of this kind, should not go into the question of the jurisdiction of the lower court on the theory of pro-rating, but should proceed along the line that the court had jurisdiction and then show that the court erred in not giving it the full injunctive relief prayed for. And then if counsel for appellees raised the question that the lower court had no jurisdiction in the action, they could meet same by reply brief. While it might be incumbent upon this court to determine whether or not the lower court had any jurisdiction in the action whatever for the purpose of passing upon the question of whether the lower court erred in giving any injunctive relief whatever, still, if appellees do not at this time raise the question, then for the purpose of this appeal this court should assume that the lower court had jurisdiction and determine the real question before it as to whether or not the appellant was entitled to the full injunctive relief asked. If this court, in looking over the Bill, came to the conclusion that the Federal Court had no jurisdiction whatever and that it would have to so decide when the matter was presented to it, then it would undoubtedly so hold at this time, which would be holding that the lower court erred in granting any injunctive relief whatever. But unless such want of jurisdiction clearly appears upon the face of the complaint, or unless counsel for the appellees raise the jurisdictional question and present

their argument and authorities on the question, then, as we understand the law, this court, on an appeal from such interlocutory orders as herein appealed from, will not go into the jurisdictional question.

In order that there may be no misunderstanding as to this jurisdictional question, we will state that it is not our intention to raise at this time the question of whether or not the lower court, in passing upon our motions to dismiss, erred in retaining jurisdiction in the action and holding that a pro-rating should be had. We still hold to the position that we took on our motions to dismiss, and will raise such question at the proper time, if we deem it necessary. But this question we will not now discuss nor present any authorities thereon. So if the appellant is willing to meet us on the direct questions raised on its appeal from the interlocutory orders, and without taking so much space and spending so much time on matters which are not properly involved on this appeal, the issues will be narrowed down and the time of this court will not be unnecessarily taken up in now considering such question.

Furthermore, if the question as to the right of the Federal Court to require a pro-rating is now raised, one of the real issues on this appeal is obscured. Once the court has come to the conclusion that the Mills judgment as obtained is a valid judgment against the Surety Company, the one question remaining is whether or not this judgment may be attacked by Leonard and Dithmer et al. The discussion of this question has been so intermixed and interwoven and

confused with the discussion of the right of the court to order a pro-rating that it is impossible to perceive where the argument on either is taken up or left off. The only apparent reason for such a mode of argument is that had appellant segregated its discussion and authorities on the point of validity of the judgment as against Leonard and Dithmer, there would have been no reasoning or decision to support the same.

JUDGMENT OF MILLS ET AL. VALID AS TO LEONARD AND DITHMER.

This question has been put in issue for the first time by the argument of appellant in its brief herein. The complaint nowhere seeks to stay the Dithmer et al. and Leonard law actions and have the same tried in the equity action, on the theory that Mills et al. are interested parties and should be given a chance to contest their claims, nor does the complaint attempt to bring Mills et al. before the Federal Court with their judgment and give Dithmer et al. and Leonard a chance to contest the validity of the default judgment. The complaint merely contains a recital that Dithmer et al. and Leonard claim that they are not bound by the default judgment, but it leaves open the question of when, where or how they are to attack or to be given a chance to attack said default judgment if they have such right.

Judge Dietrich in rendering his decision must have had in mind the clear allegations of the complaint, and concluded that the complaint was not upon any

theory whereby the defendants would be given a chance in the present action to contest each other's claims or judgments; in other words, that so far as the present action is concerned, the judgments, when obtained, will be treated as a liquidation of the different claims, and will be treated as conclusive and binding between the three different groups. No other construction whatever could be placed upon the complaint. All of the arguments up to this time have been along this theory and in fact the Dithmer et al. and Leonard actions, since the filing of the complaint herein, have been proceeding in the different courts. And we believe that our contentions in this regard are borne out by the decision of Judge Dietrich, as in referring to the conclusiveness of the Mills judgment as to the several amounts in which the judgment claimants were damaged, he comes to the conclusion and so states that this is a point he does not decide. *The reason is that such question had not been raised by pleadings or arguments.* Is it fair to the lower court or counsel that this question be raised at this time and the true meaning of the decision be distorted because not interpreted in the light of facts? Then follows the other part of his order, showing in every way that the lower court is treating the complaint according to its clear intent, and that all that said court is interested in is the matter touching the distribution of the fund after all the actions have been tried in the pending law suits and judgments filed in said court. Then said court will have an accounting by taking the amounts of said judgments and deter-

mine what the pro-rate share of each group should be. In other words, the court is not interested in the question of a trial or contest between the different defendants or different groups of defendants as to the amounts of damages, but after they have been determined in the law actions, then said federal court will attend to the distribution among the different groups of defendants and require a pro-rating for the sole purpose of preventing one group from obtaining more of the penal sum of the bond than it would be entitled to provided the aggregates of the judgments exceeded said penal sum. In brief, the theory of the present action is to have all the law actions go to judgment and then have an accounting to ascertain the pro-rate share of each.

Even the assignment of errors as filed herein did not raise this issue. It is only as such assignment appears in the brief of appellant that the validity of the judgment of Mills et al. is questioned in relation to Leonard and Dithmer et al.

Such has been the theory of the case heretofore as established by the pleadings, arguments before the court, statements of counsel, the holdings of the court and the assignment of errors preparatory to this appeal. Such discussion is out of place on this appeal. It might be, however, that this Court will consider that this question must now be considered and an adjudication made thereon. In the event this Court does give consideration to this question, we offer the following argument:

It is necessary first to give notice to the decisions cited by and discussion of appellant wherein much has been made of this question. An examination of the cases quoted from shows that there is not a single one which will sustain the position that a judgment secured in a court of law is invalid as against other claimants who were not parties in that suit but have thereafter started another equitable action.

The case of Illinois Sur. Co. v. U. S., 226 Fed. 665, which is so copiously quoted from, does not involve the point at all. There were no other claimants who had already secured judgments on their claims, whose rights were involved in that suit.

Appellant does not claim that this case holds that a judgment at law obtained prior to the equitable suit would not be conclusive—at least to the pro-rate amount of the judgment—but is commented on as seeming "a clear authority on the right to pro-rate."

The series of cases referred to on page 30 of appellant's brief, the first of said series being American Surety Co. v. Lawrenceville Cement Co., 96 Fed. 25, decided that under the act of August 13, 1894, 28 Stat. L. 278, there should be a pro-rating among the claimants, and in this first case the court makes the statement that a judgment at law would not be binding on the other suitors *to the full amount* of his judgment. But nowhere in these cases does it appear that the judgments obtained at law were invalid or not conclusive to the extent of the judgment creditors' pro-rate share. Rather do these cases hold that such

judgment is valid and conclusive as hereafter shown in this brief.

The New York cases, while upholding the jurisdiction of the equity courts in suits against the surety companies and holding that, under their form of statute, there should be a pro-rating, further hold that a judgment obtained at law before the equity suit is started is valid; and nowhere hold that the claim of the plaintiff, in such law action, need again be adjudicated.

In Guffanti v. National Sur. Co., 118 N. Y. Supp. 207, there is no mention of any other claimants nor of any judgment which had been secured prior to that action or any statement as to how such judgment would be treated.

The only New York case wherein its appears that there had been other suits at law and judgments obtained in other courts is Ill. Sur. Co. v. Mattone, 122 N. Y. Supp. 928. Counsel for appellant attempts to make it appear that those who had secured judgments at law were compelled to come in and prove their claims over again. A careful reading of the opinion, however, discloses the fact that such was not the procedure. The court, on p. 929, makes the following statement:

> "It is true that the Musco case, above cited, was an action at law by an individual claimant to recover his own loss, and was not for the benefit of creditors generally, and it also appears by the complaint in this action that judgments have been obtained against plaintiff in courts having no equitable jurisdiction."

The court by its next statement clearly shows that it considers these judgments valid by reason of the fact that proper objection had not been made during the trials of the separate law actions.

> "It does not appear, however, that the point was taken in any of these actions that an action at law would not lie at the suit of a single creditor, and in the Musco case it does appear that no such question was discussed or considered."

Counsel had apparently suggested to the Court that as to those law actions which were still pending and which had not gone to judgment, the proper method would be to enter the defense that an equitable action had been started in which the rights of the plaintiffs in the law action then pending would be adjudicated. But the court, referring to those actions, stated:

> "But even if plaintiff can successfully defend, upon this technical ground, the numerous actions brought against it at law, it is unreasonable that it should be compelled to incur the expense of doing so, when the claims of all parties can be equitably determined and adjudicated in an action properly brought for that purpose."

This clearly shows that the equitable proceedings in that case were for the purpose of adjudicating the rights of those parties *who had not already proceeded to judgment.* The further reasoning of the court is all to the same effect. The one ground for upholding the equitable jurisdiction in these cases has been to avoid multiplicity of suits.

> "In cases where many persons have claims *and are prosecuting or are about to prosecute them* at law against one of the defendants or class of defendants or a fund liable in equal degree to all those persons and to others, the court of equity, to forestall a multiplicity of actions, has jurisdiction of an action for a general accounting and adjustment of all the rights, and to restrain separate and individual actions at law in the same or other courts, thus bringing all the litigation into one suit. * * * * Such an action as this is not in the nature of an action of interpleader wherein several parties make conflicting claims to the same fund, but is entertained for the purpose of preventing a multiplicity of actions."

If this be the main purpose, then nothing is to be gained by compelling one who has already secured a judgment against the Surety Company to come into the equitable action and again prove his claim. The effect of this would be to lengthen the proceedings, rather than to avoid excessive litigation. The only object of the equity suit is to stop those proceedings which are at the time being prosecuted, and to have those parties come in and prove their claims in the same suit.

Cappadonna v. Ill. Sur. Co., 125 N. Y. Supp. 162, referred to in appellant's brief, p. 44, was an action brought in equity by one creditor for himself and others. The Surety Co. had set up a defense of being discharged by reason of having paid "judgments up to and in excess of the sum of $15,000." On demurrer to this defense it was held that since the Company

did not allege that it had paid out $15,000, but simply had paid judgments to the sum of $15,000, the demurrer would be sustained. The reason for sustaining the demurrer was that the pleadings of the Surety Company would cover a case where the company had settled judgments which exceeded in amount $15,000 by paying on a compromise a less sum. The Court, proceeding with a general discussion of the right to set up as a defense the payments of judgments, states:

> "Under these decisions I think it very doubtful whether the defendant can plead the payment of judgments recovered in actions at law *to the full amount* paid thereon, if they would be more than the pro-rate share of the creditor. The defendant could have adopted in this matter the same procedure it used in the Mattone case."

This certainly signifies that the New York court would permit a defense by the Surety Co. of the payment on prior judgments to the amount of the pro-rate share. This pro-rate share of their judgment is all Mills et al. are allowed by the order appealed from herein. This New York case, therefore, is not in favor of the appellant, but is contrary to its contention.

The Pennsylvania case, Carson v. City etc. Sur. Co., 224 Pa. 223, 73 Atl. 425, which appellant has set out in full, is likewise unfavorable to appellant. The point under discussion was not clearly raised and decided therein, but the court, by force of necessity, was compelled to consider the validity of the prior

judgment which had been paid by the Surety Company and in holding that payment by the Surety Co. on said judgment to the amount of the pro-rate share thereof was a defense up to such proportionate amount, it decided that said judgment was a valid judgment even against third persons.

All the cases, therefore, which have been cited or quoted from simply hold that under the statutes upon which said cases arose the pro-rating theory has been followed by those courts. It may be that this is all counsel expected to prove by their use. Nevertheless, appellant has thrown in remarks here and there to the effect that some of the cases hold a judgment creditor at law must come into an equity court and prove his claim over again and that Mills et al. must now come into this equity suit and again prove their claim which formerly went to judgment. But said cases instead of proving this statement bring one irresistibly to the opposite conclusion.

Can an action on a surety bond given in pursuance to Sections 295, 296, Idaho Revised Codes, be prosecuted in law, or must it be in equity only? Once it is admitted that an action at law may be had under these sections, the conclusion must follow that a judgment recovered in such law action concludes not only the surety company, but other claimants as well. If this be not so, then the jurisdiction of the law court is of no consequence, and any proceeding therein a sham. Counsel for appellant recognizes how ridicu-

lous is their contention that the judgment is not conclusive against other claimants, if it can be shown the law court does have jurisdiction over this class of cases, so appellant has attempted to show that there is no jurisdiction except in equity. They base their argument on New York and federal cases. By the decisions of neither court are they sustained.

The question has arisen several times in the New York courts. Among the decisions commenting on this point, Lordi v. People's Sur. Co., 126 N. Y. Supp. 180, is favorable in its result to the appellant; and even this case criticises the rule which it felt constrained to lay down by reason of a former New York decision. The decision of the Court of Appeals which is cited in that case as an authority, is Cappadonna v. Ill. Sur. Co., 125 N. Y. Supp. 162. An examination of this case shows that the point was not decided therein. Other New York cases have settled the law in New York and there can be no further doubt as to this question. Musco v. United Sur. Co., 117 N. Y. Supp. 21; Alessandro v. Peoples' Sur. Co., 127 N. Y. Supp. 572, and Carozza v. Peoples' Sur. Co., 131 N. Y. Supp. 448, have laid down the law in unmistakable terms. The Alessandro case, *supra*, was an action at law. The objection was made in this case that the law court had no jurisdiction and attention was called to the Guffanti cases. After referring to these cases, the court holds:

> "The cases cited do not hold that an action at law can not be maintained upon the bond by a single depositor, where there is an entire absence

of proof of the existence of other creditors. In the case at bar there is no proof that the money of any persons other than the plaintiff was embezzled, and, so far as appears, at the time his action was commenced, he was the only creditor authorized to maintain an action upon the bond. In the absence of proof of the existence of other creditors entitled to share in the fund, no authority to which our attention is directed supports the contention that this action was not properly brought and properly disposed of."

In Carozza v. Peoples' Sur. Co., 131 N. Y. Supp. 448, the action was brought on the law side of the court and counsel argued it should have been prosecuted in equity. It was held:

> "There is nothing in the nature of the plaintiff's claim which precludes its prosecution at law, and it does not appear anywhere in the case that the claimants against the surety are numerous, or, in fact, that there are any claimants at all, except this plaintiff. There is, therefore, no reason for relegating plaintiff to an equity suit, or denying him his remedy at law."

These cases all arose under the same statute. The two cases last quoted show the final outcome of the controversy in New York over the jurisdiction of a law court to entertain such an action.

Likewise the decisions in the courts of the United States establish the principle that law courts have jurisdiction of this kind of an action. Most of the federal cases have arisen under the federal statute, 28 Stat. L. 278, 6 Fed. Stat. Ann. 125. This statute

was amended in 1905. As amended this statute provides that "only one action shall be brought," and that any person commencing this action shall give notice to all known creditors and make publication in some newspaper, after which any creditor may intervene; that the surety company shall pay the amount of the bond into court, whereupon a pro-rate distribution of the proceeds shall be made. It is not strange that some decisions interpreting this act have held that the one action should be brought in an equity court which would have charge over all proceedings and of the distribution. Such was the holding of Ill. Sur. Co. v. U. S., 212 Fed. 136. However, even under this statute the Federal Courts have not been uniform in their decisions. In Ill. Sur. v. U. S., 215 Fed. 334 at 339, where this same statute was involved, the court makes the following comment:

> "Whether the action authorized by the statute in question is an action at law or in equity seems to us of no practical importance in this case, and therefore requires no discussion, because both parties duly waived a trial by jury and thereby in effect requested the court to try the case without a jury."

In U. S. v. Wells, 203 Fed. 146, the court stated:

> "There is, in my opinion, strong ground for holding that the provision of this act that only one suit shall be instituted by a creditor or creditors and for notice to other creditors of their right to intervene, with the further provision that if the recovery on the bond is inadequate to pay the amounts due all creditors judgment shall be given

to each creditor pro rata of the amount of the recovery, has the effect of making the amount due on the bond a trust fund which can only be properly administered in equity and distributed among creditors in an equitable proceeding; * * * * This view is emphasized by the fact that there is no right of intervention in a case at common law, and that a court of law has no adequate machinery for the entertainment and distribution of funds among the various beneficiaries entitled thereto. McKemy v. Supreme Lodge (C. C. A., 6), 180 Fed. 961, 966, 104 C. C. A. 117. See also 2 Bates' Fed. Proc. at Law, § 1042, p. 789. It is true, however, that on the other hand various actions at law have been maintained under this Act of 1905 in which no question as to the jurisdiction at law was suggested either by counsel or the court. Hill v. Surety Co., 200 U. S. 197, 26 Sup. Ct. 168, 50 L. ed. 437; Mankin v. Ludowici-Celadon Co., 215 U. S. 533, 30 Sup. Ct. 174, 54 L. ed. 315; United States v. Construction Co., 222 U. S. 199, 32 Sup. Ct. 44, 56 L. ed. 163; United States v. Winkler (C. C.), 162 Fed. 397. * * * * Passing, then, this jurisdictional question, and assuming that, *at least without objection* of the parties, the jurisdiction at law may properly be entertained in this case, * * * * "

It therefore appears that even under this amendment of 1905, which has features calling for equitable jurisdiction stronger by far than any other statute which we have observed, the law court will entertain jurisdiction providing no objection is made thereto.

We now call attention to the statute before the amendment of 1905. The statute formerly read as follows:

> "[The contractor shall] execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor * * * shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; * * * * upon which [bond] said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution; * * * * ."
>
> 6 Fed. Stat. Ann. 125. (28 Stat. L. 278.)

There is no decision holding that under this statute it was incumbent upon the plaintiff to start his suit in equity. The authorities are unanimous in giving to the law side of the court jurisdiction of actions brought under this statute. The case of Ill. Sur. Co. v. U. S. 212 Fed. 136, above quoted from to the effect that after the 1905 amendment the action should be in equity, distinguishes the statute as it read before the amendment. On page 138 the court states:

> "The Act of August 13, 1894, entitled 'An Act for the protection of persons furnishing materials and labor for the construction of public works,' did contemplate separate actions at law upon the bond by any and all creditors in the name of the

> United States but for their own use. *Parties obtaining judgment* would be paid in the order in which actions were brought."

In Mankin v. U. S., 215 U. S. 533, the court says:

> "The present action accrued after the passage of the statute of February 24, 1905, amending the act of August 13, 1894, in which original act a right of action was given in the name of the United States for the use and benefit of the persons supplying labor or materials in the prosecution of work provided for in the contract, and requiring a bond for the benefit of such persons. In that act there was no limitation upon the number of actions which might be brought, nor was there any preference given to the United States in a recovery upon the bond."

We now desire to call attention to the series of cases commencing with Am. Sur. Co. v. Lawrenceville Cement Co., 96 Fed. 25, and referred to in appellant's brief, pp. 30-4. These cases arose under the statute above quoted and in our minds are authority for the proposition that the law court has jurisdiction of this class of cases, and that any judgment which is rendered by the law court is conclusive upon the other parties to the equity suit. After the equity suit was started the United States made a formal appearance therein by way of intervention (110 Fed. 913). It proceeded, however, with a law action to prosecute its claim. The defendant in the suit pleaded the payment of a former judgment and also set up the facts concerning the equity suit (the equity suit is reported 96 Fed. 25). The Surety Co. also made a motion for

a stay of proceedings in the law court. The judge, after holding that he had the power to grant the stay, nevertheless decided that he did not think it necessary to do so.

> "So far as we can perceive, nothing would [be gained] except a speedier adjustment of all the questions involved, because we are of the opinion that the American Surety Company may, in this suit at common law, present to the court all the facts which are justifiable in the equity cause, so that thus, in this suit, we may apply the same rule of priority, if priority exists, or of pro rata distribution, if the law requires pro rata distribution, as the chancellor would. Consequently, as we are of the opinion that ultimately the United States can recover no more in this suit than if they were compelled to submit to our jurisdiction in the equity cause, so that all that could be gained thereby would be a speedier termination of the questions involved, our conclusion is that there are not sufficient substantial interests at stake to justify us in proceeding in the summary way which this motion asks for."
>
> United States v. American Surety Co., 110 Fed. 913.

The appeals from this decision, reported in 123 Fed. 287, 126 Fed. 811, sustain the holding of the court that it had jurisdiction to decide the case.

While discussing these cases, we desire to further call attention to the disposition made of the judgment of Lawrenceville Cement Co., which had been secured before the equity suit (96 Fed. 25) had been commenced. After the decision of 96 Fed. 25, the

claims of the different parties were filed before a master and proof made thereof. The Lawrenceville judgment had been paid by the Surety Co., which in turn had been reimbursed by a guarantor. On prorating, this judgment was turned in for its full amount and the decision of the court in American Sur. Co. v. Lawrenceville Cement Co., 110 Fed. 717, at 724, shows that proof of this claim did not have to be made over again, but the judgment was considered conclusive.

> "Therefore, with regard to the claim of the Lawrenceville Cement Company, the marshaling in this suit, with reference to all other creditors, is to be exactly the same as though the Lawrenceville Cement Company had not been in any part paid, or as though the American Surety Company had not been reimbursed. In determining, therefore, the pro rata distribution to the claimants who have been unsatisfied, the proper percentage, or the whole, as the case may be, of the claim of the Lawrenceville Cement Company, will be estimated as though still due from the complainant."

We further desire to call attention to the quotation from the equity suit (96 Fed. 25, at p. 29), copied in appellant's brief at p. 32 and emphasized by italics.

> "The question must arise, once for all, in each of the common law suits as to the actual amount of the claim in each of the others, and the determination must be final; and yet it could not be made in such way as to bind the other suitors. (The italics are ours.)"

This is evidently relied upon to show that a judgment obtained at law is not conclusive. When clearly understood, this statement conveys no such meaning. It was made by a court which had the opinion that even in a law action the principle of pro-rating would apply. According to this principle in each law action which was brought, the Surety Company would set up as a defense the amount of other claims for which it was being sued or would be sued. Proof of those several claims would be made by the Surety Company as a defense. But a determination as to the amount of these claims which are set up by the Surety Company as a defense would not be conclusive *upon those other claimants who would later prosecute their claims to judgment.*

The argument of the Court is for the purpose of showing that pro-rating should be allowed and that the equity court should take charge of all claims which have not gone to judgment before the date of the equity suit. It is not an argument against the conclusiveness of any judgment secured at law.

The following example will explain the theory of the Court. A, B and C have claims against a surety company on its bond, exceeding the penal sum thereof. A already has a judgment; B is prosecuting a law action; C has not yet started any action. In the law action of B, C not being a party thereto, the surety company would set up a defense for the purpose of compelling a pro-rating. It would introduce the judgment of A and proof as to the amount of the claim of C. The judgment of A would conclude the

amount of the claim of A, but proof of the claim of C would have to be made in detail. C, however, when he starts his law action at a later date, will not be bound by the determination of the court in the action of B, he not being a party thereto, as to the amount of his (C's) claim.

It will be seen, therefore, that all the United States cases have upheld the jurisdiction of the law side of the court. It is true that many of these cases have also upheld the theory of pro-rating. But as stated before in this brief the question of pro-rating is not at issue herein. Judgments may well be recovered in law actions and the principle of pro-rating be applied to those judgments. Such a procedure does not question the validity or conclusiveness of the several judgments, but simply marshals the assets which are to be applied to the satisfaction of such judgments.

The decisions hold the law court has jurisdiction. They force the conclusion that the law court has jurisdiction to entertain a case of this class. Once a case is started the court has jurisdiction of the subject matter and of the parties; it proceeds to judgment; all proceedings have been regular; an equity suit is started by other parties. On what ground are they to contest this law judgment? The only ground must be that the court had no jurisdiction when entering such judgments; but this contention is directly contrary to the premise with which we started, namely, that the court would have jurisdiction. There is no escape from the conclusion that when the equity suit is commenced, a judgment ob-

tained at law before such suit can not be questioned as to its validity, for if the court entering the judgment had jurisdiction of the subject matter and parties, its validity could be attacked only by reason of fraud or collusion. The only power which the equity court has is to control the assets which are to be used for the satisfaction of the judgment, and if the equity action be in that jurisdiction which upholds the right of pro-rating, the equity court will assign to the satisfaction of this judgment only the pro-rata share.

The Idaho State Court was of the opinion that it had jurisdiction of the Mills et al. action and had proceeded with the same to judgment. As a matter of fact no objection was made to the jurisdiction of the State Court on the ground that there should be a prorating or on the ground that there were other claimants who were not before the court. An examination of the statutes of the State of Idaho and the circumstances under which the Mills et al. action was prosecuted, make it certain that had such question been raised, the same would not have been sustained by the Idaho Court. Even if there had been no state or federal decisions upholding its jurisdiction, under said statutes and circumstances the court would never have doubted its jurisdiction.

In the first place, distinctions between actions at law and suits in equity and the forms of all such actions and suits are prohibited by Article V, Sec. 1, of the Constitution of Idaho. It is hardly possible therefore, that any objection could have been made to

the jurisdiction of the court in the Mills et al. action on the ground that the same should be prosecuted in the equity side of the court. Furthermore, Sec. 4111 Idaho Revised Codes, has provided the most extended license for intervention. Any person who has an interest in the matter in intervention may intervene in any action or proceeding. Any difficulties which the Federal Courts sometimes labor under by reason of the fact that the United States statutes did not provide for intervention, could not beset any judge sitting within the State of Idaho. And then the statutes directly involved herein necessarily imply that an action on said bond may be prosecuted by one person without giving notice to all others who might be interested and furthermore expressly negative the idea that there must be one suit only in prosecuting claims against a surety company.

> "Every official bond executed by any officer pursuant to law is in force and obligatory upon the principal and sureties therein to and for the State of Idaho, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity, and any person so injured or aggrieved may bring suit on such bond, in his own name, without an assignment thereof."
>
> Idaho Revised Code, §295.

> *"No such bond is void on the first recovery of a judgment thereon; but suit may be afterwards brought, from time to time, and judgment recovered thereon by the State of Idaho, or by any person to whom a right of action has accrued,*

against such officer and his sureties, until the whole penalty of the bond is exhausted."

Idaho Revised Code, §296.

The federal cases have allowed separate actions at law on the contractors' bond set forth herein. The federal statute is silent as to whether or not more than one action would be allowed. Now what court would ever hold that only one equitable action could be had under the Idaho statute which specifically provides for more than one action? The Idaho Supreme Court, in construing said sections, has held that any aggrieved party may bring a separate action at law for damages thereunder and further that several aggrieved parties, under the same breach of the same bond, may join in one action at law under separate causes of action.

State ex rel. Mills v. Am. Sur. Co., 145 Pac. 1097.

State v. T. G. & S. Co., 152 Pac. 189.

There is a further distinction which makes such a decision on the part of the court all the more reasonable. Most of the bonds which are referred to in the United States cases are contractors' bonds. These were given when a certain contract was started. When that contract was completed there was a short length of time given in which the work was to be accepted. Within a short period those parties who had claims against the contractor could start their cause of action to recover against the contractor. This was on *one* piece of work and the liability on the bond

accrued for the different parties just about the same time, and suits would naturally be started about the same time.

The official bond involved in our present case is one which insured faithful performance on the part of the officer over a period of years. Causes of action on this bond might arise at any time over that period. These causes of action would not necessarily be related to the same transaction. There might be a negligent act in one part of the State in connection with the examination of one bank; two years later there might be another cause of action arise in another part of the State in connection with another transaction.

Let us adopt for a moment the contention of appellant herein, and consider a case which might arise thereunder.

Suppose a breach occurs immediately after an officer assumes the duties of his office; he is sued on this breach and judgment recovered, but before judgment is paid, another breach has occurred; an equitable action is started involving this breach and the plaintiff in the first suit is enjoined from levying execution and forced to come into this action and try his cause over again; another judgment is obtained, but before payment, a third breach has occurred upon which suit is brought. The plaintiffs in the first two suits must again come in and not only be enjoined from collecting their judgments, but must offer evidence and prove their claims to be valid once more. And so on ad infinitum.

The court must have had in mind this very distinction, when in American Sur. Co. v. Lawrenceville Cement Co., 96 Fed. 25 at p. 27 it stated:

> "On equitable principles, all individuals who may acquire rights under the bond stand in the same relation to each other as holders of several obligations secured by the same mortgage or deed in trust,specified therein, but issued at different dates. There is only one underlying equity, which necessarily, on equitable principles, protects all interested, whether it be the United States or individuals, share and share according to the proportions of their several claims. It is possible that, from the necessity of things, there may be exceptional instances, where one creditor has been allowed to *proceed to a prior judgment;* thus, through some laches, or in consequence of other liabilities *being contracted subsequently,* obtaining an unavoidable preference.

If in the interpretation of the Federal statute, separate law actions have been permitted, how much more reasonable to find such an interpretation under the Idaho statutes and the different conditions which they are meant to cover.

In sustaining the validity of judgments secured prior to an equity suit asking for a pro-rating, the courts have simply followed well-settled principles of law.

Mills, Leonard, Dithmer and others claim a liability against the Surety Company. Each stands in the relation of a creditor. They may proceed at dif-

ferent times (at least if no objection is made at time of suit) and secure an adjudication of their claims. If one has proceeded to judgment, this judgment is conclusive as to amount and validity against all persons.

> "It is now well settled upon high authority that where no fraud or collusion has been shown in the recovery of a judgment, such judgment is conclusive of the fact and the amount of the indebtedness of the judgment-debtor, and it cannot be collaterally impeached by third persons in a subsequent suit where such indebtedness is called in question * * * And a judgment obtained without fraud or collusion is conclusive evidence, in suits between creditors in relation to the property of the debtor, of the fact and the amount of the indebtedness of the latter."
>
> Black on Judgments, §605.

The other general authorities support the law as laid down by Black.

Freeman on Judgments, Secs. 334-7.
Bigelow on Estoppel, 167-8.
Freeman on Executions, Sec. 136.
Bump on Fraudulent Conveyances, 576-7.
Wait on Fraudulent Conveyances, Sec. 270.

The leading case is Candee v. Lord, 2 N. Y. 269. In that case the court held:

> "In creating debts, or establishing the relation of debtor and creditor, the debtor is accountable to no one unless he acts male fide. A judgment, therefore, obtained against the latter without collusion is conclusive evidence of the relation

of debtor and creditor against others: First, because it is conclusive between the parties to the record, who in the given case have the exclusive right to establish it; and second, because the claims of other creditors upon the debtor's property are thru him, and subject to all previous liens, preferences, or conveyances made by him in good faith. Any deed, judgment or assurance of the debtor, so far at least as they conclude him, must estop his creditors and all others. * * * It follows from the principles suggested that a judgment obtained without fraud or collusion, and which concludes the debtor, whether rendered upon default, confession or after contestation, is upon all questions affecting the title to his property conclusive evidence against his creditors to establish, first, the relation of debtor and creditor, between the parties to the record, and second, the amount of the indebtedness."

This statement of the law is so convincing that this case has been cited and quoted from by all text-book writers and used as an authority in all later cases wherein this question was raised.

Bensimer v. Fell, 29 A. S. R. 774.
Weaver v. Haviland, 40 A. S. R. 631.
Alkire v. Richesin, 91 Fed. 79.
Ledoux v. Bank of Am., 48 N. Y. Supp. 771.
Moore v. Curry, 106 Ala. 284.
Hersey v. Benedict, 15 Hun. 282.

Such is the general principle of law covering this case. Appellant has failed to assign any reasons why the present case is any exception. The principle of this case has been followed where ordinary rela-

tions have existed between different creditors, and in no case analogous to the one at bar have the courts departed from the holding of the early New York decision.

The Federal decisions have treated this class of cases according to the principles of marshaling assets. The theory of equity jurisdiction advanced in the American Sur. Co. v. Lawrenceville Cement Co., 96 Fed. 25, is stated on page 29 of that case as follows:

> "Marshaling assets, however, is a favorite equitable ground of jurisdiction. In this case we have a quasi fund—that is, the penal sum of $18,000, named in the bond executed by the complainant—to be distributed on an equitable basis among numerous claimants. It will be found, as we proceed, that this fund cannot be distributed expeditiously or justly without the aid of this court sitting in equity."

In marshaling assets for the satisfaction of judgments and other claims the validity of the judgment is not questioned. Suppose A has two pieces of property, X and Y, each worth $10,000. B secures a judgment against A for $15,000. By the law of the State this judgment is made a lien upon all real estate of A. C later takes a mortgage on X. B starts to satisfy his judgment and issues execution on both X and Y. C goes into equity and asks that the assets of A be marshaled and that B satisfy his judgment as far as possible from Y. Can it be said that the claim of B, upon which he secured his judgment, is again put in proof in this equity suit?

A case based upon facts similar to this hypothetical statement arose in South Carolina. A statute of that State provided that, when a judgment against a railroad corporation for personal injuries was secured, the judgment should relate back to the time the cause of action arose and be a first lien. A mortgage on the property of the railroad company had been given; and at a later date a cause of action arose and judgment was secured by a passenger traveling with the company. Upon a foreclosure of the mortgage, this judgment creditor intervened and set up his prior right. The mortgagee claimed the right to dispute the validity of the judgment. The court held this right did not exist.

> "When, in marshaling the assets of this insolvent railroad company, the mortgage creditors and those claiming through them are met by this judgment and its claim to priority, they have the right to examine it, to look into the cause of action, to ascertain when and where the action was brought, to know if the conditions of the law existing when their mortgage was executed have all been complied with. They have the right to inquire into the jurisdiction of the court, and, above all, they are entitled to know that there was no fraud or collusion or gross neglect in obtaining the judgment. But, when all these are established, this judgment, when duly pleaded and proved in the court of the United States sitting in South Carolina, has the effect, not only of prima facie evidence, but of conclusive proof of the rights thereby adjudicated. A refusal to give it force and effect in this respect, which it has in

> the State in which it was rendered, denies to the judgment creditor a right secured to him by the constitution and laws of the United States."
>
> Central T. Co. v. Charlotte, C. & A. R. Co., 65 Fed. 257, 262.

Other analogous cases arise in allowing claims in Bankruptcy, in receiverships, and in the settlement of estates.

No one would suggest that a claim which had gone to judgment prior to the death of the testator could be contested during the settlement of the estate, except as to the question of how or when the judgment was secured. The same principle is involved if it be true that the debts are in excess of the assets of the estate. The "fund" must then be distributed to the claimants. It avails the appellant nothing to say that it was unknown at the time of securing the judgment that there would be debts in excess of assets and therefore a "fund" for distribution; for the same may be true under the statutes involved herein. It has been shown above how one cause of action may have gone to judgment before another has arisen. If the cause of action first arising is for a sum less than the penal bond, there is no "fund" for distribution in this case either at the time of securing judgment.

The same rule applies when a judgment is presented in the bankruptcy courts:

> "Where the amount of a claim has been determined by a State Court, and judgment entered therein, such judgment is conclusive upon the

bankruptcy court, and the judgment creditor will not be permitted to prove for a greater amount."

Collier on Bankruptcy, 861 (10th ed.)

"The judgment, when offered for proof, may be attacked only for fraud, collusion or want of jurisdiction, under the usual rules."

Remington on Bankruptcy, §682.

In none of these analogous cases has the principle as first laid down in Candee v. Lord, 2 N. Y. 269, been departed from.

The contention we make is not contrary to the best interests of the surety companies. In fact, the position which we are taking, viz., that law courts do have jurisdiction, is, in the majority of cases, favorable to the surety companies. Suppose an action is started at law by a single plaintiff, for a sum less than the amount of the bond. Does the company desire to force him into equity by means of an equity suit and bring in all others who may have claims against it? By no means, for if this plaintiff proceeds with his single cause of action, it may be that other creditors because of their laches or lack of interest will permit their causes of action to lapse. The company does not desire to excite more claimants to action. It will not raise the question of the jurisdiction of the law court. The one plaintiff secures judgment; and, if no other claimants have become active, the company will pay the judgment. But if other claimants have started suit so that the total amounts of all claims exceed the amount of the bond, they ask the aid of equity, in order to secure a pro-rating—

just as they have done in the case at bar. Such a procedure favors the company. But what justice is there in the claim of the surety company that the claim of plaintiff must be proven again in the equity suit when it was contested without objection to jurisdiction in the law court—the court where they desired the trial to be had?

Law courts have jurisdiction of this class of cases. In not a single case has an equity court refused to give full faith and credit to a judgment secured in a law court prior to the suit in equity asking for a prorating. The general principle of law must be departed from if such judgment is not held conclusive. In no analogous case has such a departure been made from this well-established principle of law, and no reason is assigned why such departure should be made in this case.

AS TO DEDUCTING DIVIDENDS FROM PRO RATE SHARE.

The argument of appellant that the dividends should be deducted from the pro-rate share of Mills et al. is without any force. The complaint shows that the aggregate amount of the claims is about $90,000. It further appears in the proceedings for stay, pending the appeal, that the total amount of the three dividends paid by the Receiver is 18%. All parties have received the same per cent. Eighteen per cent of the $90,000 would equal $16,200, which, deducted from the $90,000, would leave $73,800 due Mills et

al., Dithmer et al. and Leonard. It thus appears that the amount still due would be in excess of the penal sum of the bond of $50,000. As the Surety Co. is liable to the full amount of $50,000, it makes no difference to it then whether Mills et al., Dithmer et al. and Leonard have received a part of the payment of their claims from another source, the bank itself. If they have in the aggregate sustained damages to the amount of $90,000, then they would be entitled to collect, if they could, $40,000 from other sources, or from the principal, and still hold the Surety Co. to the penal sum of its bond. Appellant argues that the total sum of the dividends of $16,200 should be deducted from the $50,000, the amount of the bond, in other words, that it should be given credit for the dividend regardless of how many thousand dollars the said parties had been damaged over the sum of $50,000. It is evident that the Surety Co. could only ask to have the dividends deducted when they exceeded the sum of $40,000, the amount of the damages above the amount of the bond. For instance, if all parties collected dividends to the amount of $60,000, then there would remain due them only $30,000, and the Surety Co. would, of course, be entitled to have the amount of $20,000 deducted from the amount of the bond so that it would only have to pay the balance of $30,000 due.

In arriving at the pro-rate share, the dividends received would not effect the computation. All parties received the same per cent, and therefore, if the same per cent of dividends were deducted from the claims

of the different parties and then the pro-rate share determined, it would be the same and would in no way change the pro-rate share.

We shall not pursue the argument further on this question of deducting dividends as appellant in its brief has simply referred to the matter without presenting any argument thereon.

We believe that if this Court comes to the conclusion that it must determine whether or not the judgment of Mills et al. is conclusive against Leonard and Dithmer et al., that then we have herein shown that said judgment is conclusive and Mills et al. should be allowed to collect its pro-rate share without waiting years for the determination of the actions now pending, and that therefore the judgment of the lower court should be sustained.

Respectfully submitted,

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